IN THE HIGH COURT OF BOMBAY AT GOA

MISC. CIVIL APPLICATIONS NO.518 AND 519 OF 2003.

1. Shri Krishna Mhalu Pai Raikar.

2. Smt. Premal Krishna Pai Raikar.

3. Shri Milind Krishna Pai Raikar.

4. Shri Gaurang Krishna Pai Raikar,
all residents of Opp. Radhakrishna
Society, Santa Ines, Panaji, Goa. ... Appellants.

VERSUS

1. Shri Hari Mhalu Pai Raikar.

2. Smt. Nirmal Hari Pai Raikar.

3. Shri Vassant Mhalu Pai Raikar,
all residents of 126/127, Rasta
Peth, Brahma Hsg. Soc. Pune 11. ... Respondents.

Mr. M.S. Usgaonkar, Senior Advocate with Mr. A.J. Kenkre, Advocate for the Appellants.

Mr. V.R. Tamba, Advocate for the Respondents.

CORAM: A.M. KHANWILKAR, J.

DATE: 4TH DECEMBER, 2003.

ORAL ORDER:

Heard both sides.

2. Mr. Tamba has raised preliminary objection regarding the competence of these applications. He submits that ordinarily he would not have taken objection for granting the applications if it were to be filed in any other proceeding. According to him however, the Appeal from Order arises out of Inventory

proceedings and for which reason recourse cannot be taken to the provisions of the Indian Code, but the parameters provided in the Portuguese Order i.e. Article 1429 will have to be kept in mind, which provision reads thus :-

> " Art.1429: (bring on record the heirs of the deceased parties):
>
> Where the moiety holder or any heir dies before the conclusion of the inventory, the administrator shall indicate the heirs of the deceased and notice of such indication shall be given to the other parties and summons shall be issued for the purpose of inventory to the persons indicated above.
>
> The competency of the heirs may be contested by the summoned parties or notified parties, in terms of Article 1374.
>
> In case of failure to file the objections the persons indicated shall be considered as qualified, without prejudice to the provisions of Article 1375.
>
> In case of death of any creditor or legatee summoned to the inventory, their heirs may make an application to get themselves admitted by following the procedure prescribed in Article 1375. "

3. According to Mr. Tamba only the person indicated as heir by the Administrator could be brought on record and none else. He submits that although there is no provision of appeal against the

impugned order in the Portuguese Order, but since the Appeal from Order being continuation of the Inventory proceedings, the procedure as provided for the original proceedings under the Portuguese Order should be made applicable even to the Appeal from Order and not the provisions of Section 104 r/w Order 43 or any other provision of the Indian Code. Mr. Tamba has placed reliance on the decision reported in 1990 (1) G.L.T., 174 in the case of **Zacarias Durate Domingos Pereira v. Camilo Inacio Evaristo Pereira** and another decision reported in 2000(2) G.L.T., 479 in **Aruna Devi N. Gaekwad v. Sanjita Udaisingh Rane Sardessai.** He has also placed reliance on the decision of the Apex Court reported in A.I.R. 1975 S.C., 915 in the case of **Ramchandra Keshav Adke (dead) by LRs. v. Govind Joti Chavare and others** to contend that if specific procedure is provided the matter should be proceeded only as per that procedure.

4. On the other hand, Mr. Usgaonkar contends that indeed the present Appeal from Order arises out of the Order passed in Inventory proceedings, but nevertheless since remedy of appeal from order under Section 104 is available, the procedural aspects will be governed by the provisions of the Indian Code. To support this contention reliance has been placed on the very judgment in Zacaria's case (Supra) relied

upon by Mr. Tamba .

5. Mr. Usgaonkar has placed reliance on para 19 of this decision where it has been observed that in appeal or revision against any order in Inventory proceedings is governed by the provisions of Section 104 read with Orders 41 and 43 of the Indian Civil Procedure Code, which view of the Judicial Commissioner is fortified from the decision of the Apex Court in **Maria Christine De Souza Sodder v. Maria Zurana Pereira Pinto,** A.I.R. 1979 S.C., 135**2.**

6. Having considered the rival submissions, I have no hesitation in accepting the argument of Mr. Usgaonkar, learned Senior Counsel, that as Appeal against Order passed in Inventory proceedings under Section 104 of the C.P.C. is available and that has been invoked in the present case, procedural matters in this appeal will have to be dealt with as per the provisions of the C.P.C. In the decision reported in Zacaria's case (para 19) this view is clearly spelt out. Whereas Mr. Tamba was relying on the observations in para 28 of the same decision that there will be conflict of procedure. I find no substance in this argument. As observed earlier, it is common ground that there is no provision of appeal against the order passed in Inventory proceedings

which is why remedy under Section 104 has been invoked by the Applicants/Appellants. Any procedural aspect in this Appeal from Order will obviously be governed by the provisions of the Code of Civil Procedure. In other words, insofar as the Appeal from Order is concerned, the requirement provided in Article 1429 referred to above of impleading only such persons, who have been indicated by the Administrator to be the heirs of the deceased, need not be observed.

7. In the circumstances, I find no substance in the objection raised by Mr. Tamba for the respondents. The applications seek to bring on record the legal heirs of the deceased and as observed earlier, the applications will be governed by the procedure of the Code of Civil Procedure for which reason the same are allowed.

8. Applications are allowed. Amendment be carried out in one week.

A.M. KHANWILKAR, J.

sl.